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No. 92-1840

IN THE

Supreme Court of the United States

October Term, 1992

PATRICIA TORVIK and STEPHANIE TUBBS-JONES,
Petitioners,

vs.

MICHAEL G. LEVINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANKLIN J. HICKMAN
Counsel of Record
JANET L. LOWDER
STEGE, HICKMAN & LOWDER CO., L.P.A.
Standard Building—Suite 1620
Cleveland, Ohio 44113
(216) 861-0360
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Michael Levine was found Not Guilty by Reason of Insanity in 1979 and committed under Ohio law to a psychiatric hospital. In 1988, at a periodic review hearing required under state law to be held every two years, all eleven experts in psychiatry and psychology found that Levine had shown no sign or symptom of mental illness since 1982.

The question presented is:

> Whether, under the circumstances of this case, this Court should review its holdings in *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) on the constitutionality of confining an insanity acquittee who is not mentally ill.

PARTIES

Respondent is satisfied with Petitioners' list of parties.

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OPINIONS BELOW

Respondent is satisfied with Petitioners' list of opinions below.

JURISDICTION

Respondent is satisfied with Petitioners' statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent adopts Petitioners' list of constitutional and statutory provisions and adds Ohio Rev. Code Ann. §2945.40 (Baldwin 1992). This section is reproduced in the Respondent's Appendix to this Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE[1]

Michael Levine was found not guilty by reason of insanity (NGRI) in 1979 and committed under Ohio law to a psychiatric hospital. In 1988, at a periodic review hearing required under state law to be held every two years, all eleven experts in psychiatry and psychology concluded that Michael Levine had shown no sign or symptom of mental illness since 1982. Petitioners have failed to bring this evidence to the Court's attention. Instead, Petitioners are urging that testimony from Levine's 1979 trial should override these unanimous, unrebutted expert opinions.

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[1] The statement of the facts and procedural history in the opinion of the Sixth Circuit, *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993), reproduced in Petitioners' Appendix, A-1; A-2 to A-7, is incorporated herein by reference.

ARGUMENT AGAINST GRANTING CERTIORARI

I. THIS IS AN APPROPRIATE CASE FOR *HABEAS CORPUS* RELIEF

The circumstances of this case do not warrant reconsideration of this Court's long-standing principles regarding federal *habeas corpus.*[2] The federal courts were an essential tool for correction of decisions of the state courts which had been made amidst a firestorm of public pressure to keep Levine confined.

Judge Angelotta acknowledged the high level of publicity during the 1988 hearing. Transcript of 1988 Hearing, Vol. I pp. 201-09; 299; 301-02. He was aware that petitions had been signed by over 4,500 persons advocating further confinement and stated that he had been contacted by numerous persons, including members of both the United States Congress and the Ohio legislature, urging him to "rebuff any attempts to release Michael Levine, the murderer of Julius Kravitz." *Id.*, p. 302. Indeed, Judge Angelotta observed at one point in July, 1988 that "the media is making a farce of this hearing". *Id.*, p. 299. The pressure on Judge Angelotta was compounded by the Ohio rule that the judge

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[2] *See, e.g., Engle v. Isaac*, 456 U.S. 107, 135 (1982) (in appropriate cases, *habeas corpus* must be made available to correct a fundamentally unjust incarceration); *Sanders v. United States*, 373 U.S. 1, 8 (1963) (if government is always to be accountable to the judiciary for a person's imprisonment, access to courts on *habeas corpus* must not be impeded); *Fay v. Noia*, 372 U.S. 391, 424 (1963) (State's interest in finality does not outweigh the interest in preventing a detention in violation of the Constitution). Petitioners' attempt to apply the Court's holding in *Wright v. West*, 112 S. Ct. 2482 (1992) in the instant case is misplaced. In *Wright*, the Court determined that a *habeas* petitioner shall not be permitted to benefit by retroactive application of a "new rule" announced after his conviction has become final on direct appeal. There has never been any such attempt in the instant case.

conducting the review hearing be the same judge who made the finding of NGRI.[3] This system creates the potential for considerable influence on a trial judge who must stand for re-election every six years.

In the district court's June 1992 decision, Judge Rice acknowledged a similar public effort to influence the outcome of his decision (A-30) and expressed dissatisfaction with how the case was handled by the state courts:

> This Court must follow the law and make a decision on the basis of the evidence in the record. This is the same burden both understood and assumed by Cuyahoga County Court of Common Pleas Judge Angelotta, upon the record, at the beginning of the proceedings on July 6, 1988, an obligation which he then proceeded to ignore by ordering the continued hospitalization of the Petitioner, not only in spite of a factual record totally devoid of evidence which would have supported such a conclusion, but also in the face of enormous and overwhelming evidence to the contrary.

A-31-32.

The decisions of the federal courts in this case did not disturb any principle of state law and did not impose any new requirements for the state courts to follow. The federal courts simply applied well-established constitutional principles in a case where state courts ignored undisputed facts and misapplied Ohio law. While this case may be of great interest to citizens in the Cleveland area, there are no issues of national significance.

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[3] Ohio Rev. Code Ann. §2945.40(J), Respondent's Appendix at A7. Prior to 1980 the Probate Court in the county of confinement conducted the review hearings. The change in the law was prompted by the public outcry which followed the decision in Michael Levine's case.

II. THIS IS NOT A PROPER CASE TO REDEFINE THE STANDARDS FOR A FINDING OF MENTAL ILLNESS IN POST-NGRI PROCEEDINGS

A. Introduction

The facts of this case do not justify review of the standards for a finding of mental illness in a post-NGRI case. This case does not present an issue of sufficiency of the evidence; in fact, the district court found it "disturbing" that the combined efforts of the prosecutor and attorney general have been unable to produce "one shred of evidence" that Mr. Levine has shown any sign of mental illness since 1982. A-32.

B. The Evidence Shows that Michael Levine Is Not Currently Mentally Ill

1. Overview of Testimony

During Michael Levine's 1988 review hearing for continued commitment, the State trial court received reports and testimony reflecting the opinions of eleven experts in psychiatry and psychology. Every expert concurred in the judgment that Michael Levine was not currently exhibiting any signs or symptoms of active mental illness and had shown no such signs, without the need for medication, since at least 1982.[4] The experts

[4] Petitioners argue that the years of symptom-free behavior since 1982 should be discounted because of Levine's putative "recovery" shortly before the killing of Julius Kravitz. The "therapeutic triumph" which Dr. Levendula (Levine's therapist from 1973 to 1979) described in the 1979 trial has little value in assessing the significance of absence of symptoms of mental illness since 1982. Dr. Levendula experienced this "unfortunate" feeling of triumph only three days after Michael Levine had attacked his wife and shot out the tires of her car. Dr. Levendula went to the Levine house on that same day and failed to either call the police or hospitalize Levine,

(Footnote continued on following page.)

included the treating psychiatrist, Dr. Pasha, and the ward psychologist, Dr. McIntosh, both from the Dayton Mental Health Center (DMHC). Both had frequent, even daily, contact with Michael Levine and had full access to the daily notes from other members of the treatment team. Dr. McIntosh testified that his conclusions were based on over a thousand hours of personal clinical contact and on the results of three separate objective tests (the MMPI) administered in 1985, 1986, and 1988.

2. Testimony of Dr. Rizk

Neither the prosecutor nor the Attorney General[5] presented any evidence to rebut the experts' conclusions that Michael Levine had not shown any signs of mental illness since 1982. The prosecution called a single expert witness, Dr. Rizk. Dr. Rizk, who was thoroughly familiar with Levine's history, recommended commitment in 1979. He examined Michael Levine four times since 1979, each time in connection with Levine's eligibility for civil commitment after having been found NGRI. Dr. Rizk testified that, during his 1988 interview, Michael Levine showed no "signs of a substantial disorder of thought, mood, perception, orientation or memory" (Transcript of

(Footnote continued from preceding page.)
even though he realized that Levine was delusional. Dr. Levendula testified that he took no action at the time because he was terrified of Levine after Levine threatened to kill Levendula during a therapy session. Transcript of September, 1979 Trial, Vol. III, Levendula at TR III-50-5. Ten days after shooting out his wife's tires, Levine shot Julius and Georgene Kravitz.

[5] The Attorney General represented the hospital in the commitment review proceedings (Ohio Rev. Code Ann. §2945.40(G); Respondent's Appendix at A6). In 1983 the Attorney General rested after submitting reports which recommended Michael Levine's discharge. During the 1988 hearing, the Attorney General rested after adopting the conclusions of Dr. Rizk (Transcript of 1988 Hearing, Vol. I, pp. 211-12). The Attorney General has never participated in any of the state appeals process on behalf of any party, not even as co-signator.

1988 Hearing, Vol. I, Rizk at TR I-121), and that Levine had not exhibited any such signs when Dr. Rizk examined him in December of 1982, December of 1983, or November of 1985. Dr. Rizk's most recent report, dated June, 1988, stated that Michael Levine "is presently not suffering from any active psychosis in spite of the lack of antipsychotic medication for the last seven years." (Appendix DD: Appendix Vol. III, Exhibits and Opinions, accompanying Motion to Issue Writ at p. 3).

The fact that Dr. Rizk's 1988 report offered conditions for discharge did not imply that Dr. Rizk had determined that Michael Levine was mentally ill subject to hospitalization under Ohio law.[6] Dr. Rizk stated unequivocally, both in his written report and on the witness stand, that Levine showed no signs or symptoms of mental illness, and that Levine's prior illness was in full remission. A-10. He recommended that Levine be *unconditionally discharged* if the court determined that a diagnosis of mood disorder in full remission did not meet the requirements of mental illness as defined in Ohio Rev. Code Ann. §5122.01. A-88. Even if the court concluded that remission met the legal definition of mental illness, Rizk recommended Levine's conditional release as the least restrictive and most appropriate placement alternative. The inclusion of conditions as an alternative in his report does not mean that Dr. Rizk found Michael Levine to be mentally ill.

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[6] This argument was not raised by either the Attorney General or the prosecutor in state court, at the district court level or in any of their briefs filed with the Sixth Circuit.

C. The Lower Federal Courts Correctly Refused to Give Controlling Effect to Testimony from 1979 and 1980

Petitioners urge this Court to accept testimony from 1979 and 1980—that Michael Levine had an incurable illness—as conclusive evidence of his mental condition in 1988.[7] The Court of Appeals for the Sixth Circuit correctly observed that if this approach were adopted, there would be "an irrebuttable presumption that Levine can never be released." A-11. The Sixth Circuit continued:

> If it were sufficient for the state merely to demonstrate that Levine was mentally ill at the time he was found not guilty by reason of insanity, it would be pointless for the state to mandate hearings at two-year intervals to determine whether a committed individual should be released.

A-12. Ohio law does not support Petitioners' argument that the 1979-1980 evidence should be controlling in 1988. The Sixth Circuit correctly pointed out that the Ohio Supreme Court, in *In re Burton*, 464 N.E.2d 530, 534 (Ohio 1984), clearly stated that the "individual's *present* mental state must be evaluated upon current or recent behavior as well as prior dangerous propensities of the person." A-9. Petitioners have cited no authority from any jurisdiction which would dictate a different conclusion. There is no reason for this Court to alter the principles which led the Sixth Circuit to its conclusion.

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[7] In making his 1988 ruling ordering continued commitment, Judge Angelotta observed that the evidence from the experts testifying at the 1979 sanity hearing made it "abundantly clear that he suffered chronic illness *for which there was no known cure.*" (emphasis added). A-82. He then concluded:

> Given the fact that psychosis is an illness *for which there is no known cure*, I find that the perhaps well-meaning doctoral diagnosis of remission and recommendation of conditional release to be in error or, stated in a more legal sense, the testimony not to be credible (A-85).

The evidence that Michael Levine's condition was "incurable" in 1979, even if considered, is not sufficiently compelling to warrant review of this case. The focus of the expert testimony during the NGRI trial in 1979 was whether he was legally insane at the time of the killing of Julius Kravítz, not how long his condition would last.[8] In 1980, Dr. Tanay and Dr. Miller, the experts cited by Petitioners as testifying that Levine's psychosis was incurable, based their observations on minimal contact with Levine after his NGRI trial.[9] Neither the prosecution nor the Attorney General chose to call either Dr. Tanay or Dr. Miller to testify in 1988 about Michael Levine's mental state after 1982.

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[8] The only direct references to the curability of Michael Levine's condition during the 1979 trial came in cross-examination of Dr. Resnick, the prosecution expert, who testified that Levine was sane at the time of the killing.

[9] Dr. Tanay last conducted a psychiatric interview with Michael Levine in 1979 prior to testifying in the original NGRI trial. His only subsequent contact was a short meeting on the day of the November 1980 review hearing—a meeting which was held with several mental health professionals (including Dr. Miller) and Jerome Weiss who was then counsel for Mr. Levine. Even Dr. Tanay refused to characterize the meeting as a psychiatric evaluation.

Dr. Miller testified in the April, 1980 hearing that he had never interviewed Mr. Levine alone. His clinical evaluations consisted of attending an interview conducted by Dr. Resnick in 1979 (during which Dr. Miller posed a single question), reviewing a short video tape in 1979, and sitting for about thirty minutes in a room with Mr. Levine, Dr. Tanay and Jerome Weiss, on the morning of the 1980 hearing. He also reviewed records from Lima State Hospital and the letters to Linda Levine (Transcript of April, 1980 Hearing, Vol. I, Miller at TR I-144, pp. 192-93).

III. THIS COURT SHOULD NOT DISTURB ITS HOLDINGS IN *FOUCHA v. LOUISIANA*

This case presents no novel issues or unusual circumstances which should lead the Court to change its recent holdings on the standards of confinement of a person who has been found NGRI. One year ago, this Court unequivocally held that an individual found NGRI cannot be confined in a mental institution if that individual is not mentally ill. *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992). The Supreme Court reiterated that the state can constitutionally make an initial commitment of a person found NGRI without a separate finding of mental illness. *Id.* at 1783 (citing *Jones v. United States*, 463 U.S. 354 (1983)). Once the person is no longer mentally ill, however, the state cannot continue to confine that individual. "[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* at 1784. Because the State of Louisiana did not even contend that Foucha was mentally ill, this Court declared that "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." *Id.*

Every federal court clearly recognized there is simply *no* evidence to support a finding of mental illness in 1988. The clarity of the record on this point makes this case functionally similar to *Foucha* and consistent with all other relevant precedents of this Court.[10]

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[10] The holdings of the Court in *Foucha* confirm earlier principles set forth in *Jones v. United States*, 463 U.S. 354 (1983) and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

IV. THERE IS NO BASIS FOR REVIEWING STANDARDS ON DEFERENCE TO STATE COURT FINDINGS OF FACT

The Sixth Circuit correctly concluded that the finding of mental illness in the context of civil commitment cases is a mixed finding of fact and law and hence not entitled to any presumption of correctness. A-12. There is no dispute among the circuits on this conclusion (see cases cited at A-12) and this conclusion is not contrary to any prior holding of this Court. A federal court is not required to give deference to findings of a state court on Michael Levine's state of mind when that state court has allowed nine-year old evidence to outweigh the unanimous opinion of eleven experts who had recently evaluated Levine.

The Sixth Circuit correctly adopted the standard for review defined in *Jackson v. Virginia*, 443 U.S. 307 (1979). A-8. After full consideration of the relevant evidence offered by the State to support its conclusion, the court of appeals, as well as the district court, found that no rational trier of fact would reject unrebutted testimony of eleven experts that Michael Levine had shown no sign of mental illness since 1982. The courts did not reject consideration of the 1979 evidence, but concluded that testimony on incurability in 1979 should not control the outcome of the 1988 hearing.

The principles defined by this Court in the cases cited by Petitioners (Petition, pp. 15-16) are fully consistent with the analysis of the Sixth Circuit and the district court. All involved assessments of mental state based on facts adduced at trial or during a confession. This Court has consistently given deference to such state trial court findings, but only if the conclusions are "fairly supported in the record." *Miller v. Fenton*, 474 U.S. 104, 116 (1985). This Court does not require deference when historical facts and direct observations of the trial court are interpreted in light of a legal standard.

V. THIS CASE DOES NOT CONFLICT WITH ESTABLISHED PRINCIPLES GOVERNING PROCEDURAL DEFAULT

The conclusions of the Sixth Circuit on procedural default (A-15-18) are consistent with recent decisions of this Court. *Sochor v. Florida*, 112 S. Ct. 2514 (1992); *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Ylst v. Nunnemaker*, 111 S. Ct. 2590 (1991). The Petitioners' statement that the lower court's decision "eviscerates this Court's procedural default jurisprudence" (Petition, p. 17) is a mischaracterization of the holding of the lower court.

A. Constitutional Issues Were Presented to the State Trial Court

The Magistrate found, upon review of the expanded record, that "it is clear that Mr. Levine raised in the Cuyahoga County Common Pleas Court and again on appeal the question of the constitutional sufficiency of the evidence." A-44. The district court stated that "it is clear beyond peradventure that Levine argued to the trial court that his confinement was unconstitutional in that it was based on insufficient evidence." A-35.

The Sixth Circuit acknowledged that the state trial court was "necessarily aware" of the constitutional arguments. A-17, n.7. On May 12, 1988, Magistrate Judge Merz personally sent Judge Angelotta a copy of the Magistrate's opinion of March 30, 1988 in which he granted the writ of *habeas corpus* with a full explanation of his reasoning. In a hearing held on May 17, 1988,[11]

[11] The transcript of the hearing on May 17, 1988 was not included in the record on appeal because prior to the opinion of the court of appeals no party had raised the question of whether the constitutional issues had been properly presented in the trial court.

(Footnote continued on following page.)

Judge Angelotta acknowledged receiving this opinion. Judge Angelotta acknowledged at the same hearing that counsel for Levine had provided him with copies of all orders and briefs which were connected with the federal court proceedings.

After the 1988 hearing was completed, the constitutional issues were once again fully briefed in the state court of appeals and in the Ohio Supreme Court.[12]

B. Procedural Default Was Not an Adequate and Independent State Ground for the State Appeals Court Decision

The Sixth Circuit correctly decided that the Ohio court of appeals' statement of waiver was not an adequate and independent state ground for the decision of the state appellate court. A-17. This determination does not conflict with this Court's most recent decision concerning the procedural default rule. *Sochor v. Florida*, 112 S. Ct. 2114 (1992).

The facts of the instant case are different from *Sochor*[13] because, in *Sochor* the petitioner had been unable to establish that the state court decision (that his claim was not "preserved for appeal") was not an

(Footnote continued from preceding page.)

When the appellate court issued its decision, counsel attempted to obtain the transcript and was advised that the transcript notes had been destroyed in a fire in the Justice Center. The transcript was received through the Attorney General on June 11, 1990.

[12] There has never been any question that the constitutional claims were presented to Judge Angelotta in the 1983 hearing, nor that the constitutional issues were fully briefed in the appeals court and Ohio Supreme Court during the appeal of the 1983 decision.

[13] The language used by the Ohio Court of Appeals regarding the alleged waiver of Levine's constitutional claims was very similar to that used by the Florida Supreme Court and reviewed by this Court in *Sochor v. Florida*, 112 S. Ct. 2114, 2120 (1992).

adequate or independent ground for the state court decision. *Sochor v. Florida*, 112 S. Ct. 2114, 2120 (1992). By way of contrast, both the Sixth Circuit and the district court, in reviewing Levine's appeal, found first, that the Ohio appellate court reached the merits of the specific constitutional claims, and second, that the sufficiency of the evidence issue which was thoroughly addressed in the decision of the state court of appeals was functionally identical to the federal law claim.[14] A-16, 35 and 44-45.

C. The Cause and Prejudice Exception Applies

Michael Levine can establish cause and prejudice[15] even if this Court finds that there was procedural default. Although the lower courts did not find it necessary to reach the issue of cause and prejudice, this issue was fully briefed before the district court and the Sixth Circuit.

There was adequate cause for counsel to believe that the constitutional issues were fully presented to the state trial court before the July, 1988 hearing. As discussed above, Levine's constitutional arguments had been fully briefed during the appeal of the 1983 hearing and were raised again before the trial court during the May 17, 1988 hearing. Counsel had provided copies of all federal pleadings and decisions to Judge Angelotta at that hearing. Counsel reasonably believed—based both on the entire record and his recent submissions of the federal

[14] Although not specifically addressed by the lower court, the Sixth Circuit opinion implies that one of the bases for its ruling was that the rule applied by the Ohio appellate court to justify its finding that Levine had waived his constitutional claims is a discretionary rule and is not consistently applied in Ohio. *In re M.D.*, 527 N.E.2d 286, 286-87 (Ohio 1988).

[15] The standards are set forth in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986).

material—that the constitutional issues were fully presented in writing prior to the July, 1988 hearing and that the issue of waiver of the constitutional claims would never arise. There was adequate cause for counsel's failure to submit the May 17, 1988 hearing transcript to the Ohio court of appeals because the transcript had been destroyed in a fire and, since no party had raised procedural default in briefs submitted to the Ohio court of appeals, there was no apparent reason to obtain a copy of the transcript.

Michael Levine undoubtedly meets the prejudice prong of the cause and prejudice test. The district court has declared that "Levine continues to be confined at the DMHC in violation of his constitutional rights. . . . One more minute of illegal confinement constitutes irreparable injury to Levine." (Decision and Entry Overruling Respondent's Motion for Stay Pending Appeal, pp. 3-4).

D. The "Actual Innocence" Exception

Finally, this case is not a proper vehicle by which this Court should address the "actual innocence" exception set forth in *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Having found other compelling reasons to grant review, the Sixth Circuit mentioned this exception only briefly in a footnote. A-18, n.9. If the doctrine should be applied, it is clear that forcing Michael Levine to remain in a psychiatric hospital absent any sign of mental illness since 1982 is a fundamental miscarriage of justice. Repeated appeals to the state courts have not corrected this injustice.

VI. THIS COURT SHOULD NOT ACCEPT REVIEW TO CORRECT A HARMLESS ERROR

The Sixth Circuit was correct in its conclusion that the district court's reference to post-1988 information was harmless error. A-19. This case does not offer any reason for this Court to accept review to alter this result.

The district court's expansion of the record to include 1992 psychiatric evaluations of Michael Levine (A-29) was not prejudicial to Petitioners, nor did it change the nature of the claim under review. Petitioners overlook the fact that the Magistrate Judge recommended on June 28, 1990 that Levine's petition for *habeas corpus* be granted and that the district court conditionally adopted the report and recommendations of the Magistrate Judge, subject to the filing of a transcript, on July 31, 1991. A-34. As noted by the Sixth Circuit, both of these decisions were issued before the record was expanded to include the 1992 evaluations. A-19. The decision of the lower court was not changed by the additional evidence.

CONCLUSION

This Court should decline to grant the Petition for Certiorari or, in the alternative, summarily affirm the judgment of the Sixth Circuit.

Respectfully submitted,

FRANKLIN J. HICKMAN
Counsel of Record
JANET L. LOWDER
STEGE, HICKMAN & LOWDER CO., L.P.A.
Standard Building—Suite 1620
Cleveland, Ohio 44113
(216) 861-0360
Counsel for Respondent

APPENDIX

Ohio Revised Code §2945.40 Verdict of not guilty by reason of insanity; effects; procedures; commitment; conditional release; monitors; notice

(A) If a person is found not guilty by reason of insanity, the verdict shall state that finding, and the trial court shall conduct a full hearing to determine whether the person is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order, as defined in sections 5122.01 and 5123.01 of the Revised Code. Prior to the hearing, if the trial judge believes that there is probable cause that the person found not guilty by reason of insanity is such a mentally ill or mentally retarded person, he may issue a temporary order of detention for that person to remain in effect for seven court days or until the hearing, whichever occurs first.

Any person detained pursuant to such an order shall be held in a suitable facility taking into consideration the place and type of confinement prior to and during trial.

The hearing shall be held in the trial court within seven court days after the finding of not guilty by reason of insanity. Failure to conduct the hearing within the seven-day period shall cause the immediate discharge of the respondent, unless a continuance is granted by the judge for not longer than seven court days for good cause shown.

Except as otherwise provided in this section, the hearing shall be conducted pursuant to divisions (A)(1) to (5) and (A)(8) to (15) of section 5122.15 or divisions (A)(1) to (5) and (A)(8) to (14) of section 5123.76 of the Revised Code. The hearings shall be open to the public.

(B) Upon completion of the hearing, if the court finds there is not clear and convincing evidence that the person is a mentally ill or mentally retarded person subject to hospitalization or institutionalization by court order, the court immediately shall discharge the person, unless a detainer has been placed upon the person by the department of rehabilitation and correction, in which case the person shall be returned to that department.

(C) If the court finds by clear and convincing evidence that the person is a mentally ill or mentally retarded person subject to hospitalization or institutionalization by court order, it shall make a commitment authorized by divisions (C) to (E) of section 5122.15 or divisions (C) to (E) of section 5123.76 of the Revised Code, and shall send to the place of commitment all reports of the person's mental condition at the time of the offense and at the time of commitment that were prepared pursuant to section 2945.39 or Chapter 5122. or 5123. of the Revised Code and any other information the court considers relevant, including any part of the trial transcript. The commitment shall be pursuant to divisions (H) and (I) of section 5122.15 and divisions (H), (I), and (J) of section 5123.76 of the Revised Code, except as provided in this section.

(D)(1) In deciding the nature of commitment pursuant to division (C) of this section, the court shall order the implementation of the least restrictive commitment alternative available consistent with the public safety and the welfare of the person. As part of the least restrictive commitment alternative, the court may grant conditional release to a person found not guilty by reason of insanity. In determining whether to grant conditional release, the court shall evaluate the potential risks to public safety and the welfare of the

person. In evaluating the potential risks to public safety, the court shall consider the current quantity of psychotropic drugs and other treatment the person is receiving and the likelihood the person will continue to take the drugs and continue the other treatment while on conditional release.

If the court makes a determination to grant a conditional release, it may set any conditions on the release with respect to treatment, evaluation, counseling, or control of the respondent that ensure the protection of the public safety and the welfare of the person.

(2) A conditional release granted pursuant to this section is a commitment. Any person granted a conditional release is entitled to the hearings on continued commitment pursuant to division (H) of section 5122.15 and division (H) of section 5123.76 of the Revised Code.

(3) If a person, agency, or facility is assigned to monitor a person on conditional release, it shall notify the court of any violation of the terms of the conditional release by the person being monitored immediately upon learning of the violation. Upon learning of the violation, the court may issue a temporary order of detention pursuant to division (A) of this section to remain in effect for seven days and shall, at the request of the prosecutor, or may on its own motion conduct a hearing, within seven days, in which the person has the same rights as at a full hearing pursuant to division (A) of this section on whether the conditional release shall be modified or terminated.

Before any hearing held pursuant to this division, the trial court shall give the prosecutor reasonable notice of the hearing. At any such hearing, the prosecutor shall present the case demonstrating that the person violated the terms of the conditional release.

(4) At any time after commitment pursuant to this section, if, after evaluating the potential risks to public safety and the welfare of the person, the chief clinical officer of the hospital or facility, or the managing officer of the institution, or director of the program, or the person to which a person found not guilty by reason of insanity is committed recommends the conditional release of the committed person, the chief clinical officer, managing officer, director, or person shall send written notice of the proposed conditional release by certified mail to the trial court in which the person was found not guilty by reason of insanity, the attorney general, and the prosecutor. No later than thirty days after receiving the notice, the trial court shall hold a full hearing on whether the conditional release should be granted and shall give the prosecutor and attorney general written notice of the time and place of the hearing at least fifteen days before it is held. At the conclusion of the hearing, the court may grant conditional release pursuant to this section.

(5) At any hearing in which the discharge of a person found not guilty by reason of insanity is at issue, the court, in determining whether to grant a conditional release in lieu of discharge, shall evaluate the potential risks to public safety and the welfare of the person in the same manner as under division (D)(1) of this section. The court may grant a conditional release of such a person pursuant to this section.

(6) Conditional release shall terminate no later than on the expiration of the maximum sentence the person could have served in a penal institution if he had been convicted of the most serious offense for which he was found not guilty by reason of insanity. In case of such a termination of conditional release, the trial court judge

shall notify the prosecutor of the termination at least ten days before it is scheduled to occur. The prosecutor may file an affidavit pursuant to section 5122.11 or 5123.71 of the Revised Code, for the hospitalization or institutionalization of the person whose conditional release was so terminated.

(E) A person committed under this section is entitled to all hearings on continued commitment applicable to him under either division (H) of section 5122.15 or division (H) of section 5123.76 of the Revised Code. At least fifteen days before such a hearing, the trial court judge shall send written notice of the hearing by certified mail, return receipt requested, to the attorney general and to the prosecutor in the case in which the person was found not guilty by reason of insanity. The hearings shall be held in accordance with division (G) of this section.

(F) Before discharging, releasing, authorizing a trial visit for, or transferring a person committed under this section, the chief clinical officer of the hospital or facility, or the managing officer of the institution, or director of the program, chief of the division of mental retardation and developmental disabilities programs or his designee, or person to which the person is committed shall send written notice by certified mail, return receipt requested, to the trial court in which the person was found not guilty by reason of insanity, the attorney general, and the prosecutor advising the trial court, the attorney general, and the prosecutor of the proposed discharge, release, trial visit, or transfer. The notice shall include the hospital's or facility's report on the current status of the person and its recommendations concerning the pending action.

No later than thirty days after receiving the notice, the trial court shall hold a full hearing on the person's commitment and shall give the prosecutor and the attorney general written notice of the time and place of that hearing at least fifteen days before it is held. At the conclusion of the hearing, the trial court may discharge, release, authorize a trial visit for, or transfer the person or continue commitment pursuant to division (C) of this section.

(G) At any hearing held pursuant to this section and Chapter 5122. or 5123. of the Revised Code to determine if a person found not guilty by reason of insanity will be committed, released, granted a trial visit, transferred, or discharged, the prosecutor shall present the case demonstrating that the person is a mentally ill or mentally retarded person subject to hospitalization or institutionalization by court order or the position of the county prosecutor on questions of the transfer, trial visit, or discharge. An attorney designated by the attorney general shall represent the hospital, facility, program, or institution to which the person was committed, if the person has been committed.

(H) A person who is found not guilty by reason of insanity cannot voluntarily commit himself to a hospital or institution pursuant to sections 5122.02, 5123.69, division (G) of section 5122.15, or division (G) of section 5123.76 of the Revised Code, unless the person, at a hearing held pursuant to division (A) of this section, was found:

(1) Not to be a mentally ill or mentally retarded person subject to hospitalization or institutionalization by court order; or

(2) To be a mentally ill or mentally retarded person subject to hospitalization or institutionalization by court order, was involuntarily committed pursuant to division (A) of this section, or section 5122.15 or 5123.76 of the Revised Code, and was finally discharged.

(I) In all hearings pursuant to this section, the person found not guilty by reason of insanity may retain counsel of his choice. If the person is indigent, the court shall appoint a public defender or other counsel to provide legal representation to such persons.

(J) The hearings held pursuant to divisions (D)(4), (E), and (F) of this section shall be held by the trial court judge, or if he is not available, by another judge of the court with jurisdiction over the matter. In the hearing judge's discretion, the hearing may be held in the county in which the trial court is located or in the county in which the hospital or facility is located.

HISTORY: 1990 S 24, eff. 7-24-90

1988 S 156; 1981 H 1; 1980 H 965, S 297; 1978 H 565

Note: Former 2945.40 repealed by 1978 H 565, eff. 11-1-78; 1953 H 1; GC 13441-4.